

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Bky. No.: 04-32864  
Chapter 7 Case

James Harold Jutz,  
Darleen Mary Jutz,  
Debtors.

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**SUPPLEMENTAL MEMORANDUM OF LAW IN RESPONSE TO FIRST  
FEDERAL BANK'S OBJECTION TO EXEMPTIONS**

Since filing the debtors' response to the bank's objections to exemptions, counsel has looked for additional authority for the seemingly obvious proposition, that waiver of objections for purposes of a specific security agreement is not a general waiver as to all creditors or for bankruptcy purposes. Long established case law confirms that proposition.

First, as to tools of the trade, 11 U.S.C. § 522(f)(1) explicitly trumps a purported waiver of exemptions, in order to permit lien avoidance.

Second, as the Supreme Court emphasized more than a century ago, "it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, the assignee [bankruptcy trustee] acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not." *Lockwood v. Exchange Bank*, 190 U.S. 294, 299 (1903), *quoting In re Bass*, 3 Woods, 382, 384, Fed. Cas. No. 1,091. *See also In re Ingraham*, 125 F. 913, 915 (8<sup>th</sup> Cir. 1903); *In re Nye*, 133 F. 33, 36 (8<sup>th</sup> Cir. 1904) ("The waiver of the exemption in the mortgage is in favor of the mortgage creditor alone, and does not inure to the benefit of others."), *citing McArthur v. Martin*, 23 Minn. 74, 1876 WL 4268 (1876).

Specifically as to the *Georgens* case cited by the bank, the Eighth Circuit has rejected the bank's argument:

The appellant argues that under *Moyer v. International State Bank of International Falls*, 404 N.W.2d 274 (Minn.1987), and *Georgens v. Federal Deposit Ins. Corp.*, 406 N.W.2d 95 (Minn.Ct.App.1987), farm machinery and equipment encumbered by a security interest are no longer considered exempt by the State of Minnesota. \* \* \* PCA gleans from these cases the unwarranted legal conclusion that Minnesota considers farm machinery and equipment not to be exempt where such property has been voluntarily encumbered by a security interest granted by the debtor. Rather, we read *Moyer* and *Georgens* to stand for the proposition that the debtor waives the protections granted by state law in Minn.Stat. § 550.37, subd. 1 by encumbering his or her property. The Minnesota "statute does not forbid a debtor to mortgage protected property and to create a lien against identified property which can be foreclosed *despite the property's exempt status*." *Moyer*, 404 N.W.2d at 277.

*In re Thompson*, 884 F.2d 1100, 1102 to 884 F.2d 1100, 1102 (8<sup>th</sup> Cir. 1989) (emphasis added by Eighth Circuit).

As previously noted, the bank has remedies under state law and to a limited extent under the modern FRBP 7001(2) to pursue its *in rem* claims against property. However, its objections to exemptions based on its alleged interests in property are not well-taken, and should be overruled.

Respectfully submitted,

/s/ Kurt M. Anderson

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### **Declaration of Service via Facsimile**

Kurt M. Anderson respectfully declares to that on August 19, 2004, he served the following items:

Supplemental Memorandum of Law  
This proof of service

Via facsimile on the following individuals or entities:

Andrew Moratzka	612-305-1414
Paul Bucher, Trustee	507-288-9342
US Trustee	612-664-5516

### **VERIFICATION**

I hereby declare under penalty of perjury that I have read the foregoing declaration; and that the facts stated therein are true and correct.

Executed on: August 19, 2004 /s/ Kurt M. Anderson